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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 850

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT,
Plaintiff,

versus

JOHN CHARLES AURIANNE, No. 42,490

—AND—

HENRY AURIANNE, ET AL., No. 42,496,
Defendants.

(CONSOLIDATED)

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. _____

THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT,

Plaintiff,

versus

JOHN CHARLES AURIANNE, No. 42,490

—AND—

HENRY AURIANNE, ET AL., No. 42,496,

Defendants.

(CONSOLIDATED)

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

The petition of JOHN CHARLES AURIANNE and HENRY AURIANNE, ET AL., seeks certiorari to review a judgment of the Supreme Court of Louisiana, and, in support of their petition, respectfully shows:

OPINIONS BELOW.

The original opinion of the Supreme Court of Louisiana, and the opinion of the Civil District Court for the Parish of Orleans (Court of first instance), are printed in Appendix "A" hereto.

JURISDICTION.

The decree of the Supreme Court of Louisiana was handed down on December 12th, 1955. Rehearing was denied on January 16th, 1956. Jurisdiction of this Court, which lies under 28 U.S.C., 1257(3), is discussed at page five below.

QUESTION PRESENTED.

The important Constitutional questions at issue are:

Does the action by the Board of Levee Commissioners of the Orleans Levee District in passing a resolution approving recommendations of its Executive Committee, and stating that said property was duly appropriated, without taking physical possession of it; without disturbing, in any way, the physical possession of the owner; and without making any tender of the price to be paid, or affording any procedure for the determination and collection of the amount due the property holder; constitute a valid appropriation?

Further, does this Board, after allowing a lapse of 24 years to intervene between the resolution of appropriation, and the first step to accomplish it, still retain its right to appropriate as of the date of original resolution and to fix the value as of such original date?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are:

1. Amendment No. 5 of the United States Constitution;
2. Amendment No. 14, Section 1 of the United States Constitution;
3. Act 292 of 1928 of the Legislature of Louisiana, amending (when adopted at the polls) Article 16, Section 7 of the Constitution of Louisiana.

STATEMENT OF THE CASE.

Article 16, Section 7E, Constitution of Louisiana of 1921, gives the Levee Board the power to acquire property in the Lake Pontchartrain area, for reclaiming and redevelopment, by purchase, donation, appropriation or expropriation. The property involved here is not needed, nor will it be used, for levee purposes or any other public use; but will be resubdivided and sold for residential sites at a large profit to the Levee Board. This is not the traditional servitude granted for levee purposes on the banks of navigable streams or lakes. Revised Civil Code, Art. 665.

The same section provides that the price to be paid property owners for their lands is the fair market value before the improvements were contemplated or begun.

The Levee Board's Executive Committee on August 8, 1930 made certain recommendations fixing the boundary for the project and recommended that any property

within said boundary, not theretofore appropriated, and taken possession of, should be appropriated and possessed by the Board; and further, that the owners be paid the market value at the time of its appropriation by the Levee Board from *ad valorem* taxes to be levied on real estate in the City of New Orleans in accordance with law. (Transcript, pp. 9-11).

On October 21, 1930, the regular meeting of the Levee Board was held, and a resolution approving the Executive Committee's action was adopted, and reaffirmed that the property defined in the Executive Committee's recommendations of August 8, 1930, be duly appropriated for said work. (Transcript, p. 12).

The Levee Board had, in 1925, entered into a dredging contract with the Reynolds Dredging Company for the dredging and filling in of property in the area so defined, in order to bring it to grade for the development, and to reclaim property under the waters of the lake. However, the property involved in the case at bar was not included in the land filled, as the improvements thereon were occupied by your petitioner as his family residence.

From 1930, until suit was filed on November 17, 1954, the Levee Board did absolutely nothing to the property of JOHN CHARLES AURIANNE to complete its appropriation neither taking possession nor making arrangements to pay compensation therefor. During the trial of this cause in the Court of original jurisdiction, the Levee Board freely admitted these facts.

The trial court found as a fact that no appropriation had ever been completed or attempted, and awarded

the owner compensation as of the day on which suit was filed, to-wit: November 17, 1954.

On appeal to the Supreme Court of Louisiana this judgment was reversed.[1]

The majority opinion, written by Chief Justice Fournet, points out that, although no physical entry was made on said property, the compensation to be paid must be the market value as of October 21, 1930, and not the value as of the day on which suit was filed.

In his concurring opinion, Mr. Justice McCaleb, although tending to agree with the trial judge, stated that the Louisiana Constitution fixed the price to be paid as the actual cash value of the property before the contemplated improvement was proposed and begun.

Application to the Supreme Court of Louisiana for a rehearing was denied.

ARGUMENT.

I.

JURISDICTION TO GRANT THE WRIT.

Since the ultimate holding of the opinion of the Supreme Court of Louisiana is ostensibly a "construction" of the constitutional amendment involved, the initial inquiry is whether this Court has jurisdiction to hear this case.

As stated above, this ostensible holding is that a constitutional amendment explicitly gives the right to

[1]Respondents' plea based on due process, was preserved on appeal by specifications of error in their briefs, as provided by the Rules of the Supreme Court of Louisiana. (See Appendix "C").

the Board of Levee Commissioners of the Orleans Levee District to take private property, but perpetuates their right to pay compensation fixed at a set time, (October 21, 1930) regardless of when the property is initially or actually taken possession of, or the rights of the owner interferred with; and without any provision made for the payment of the market value, and without affording the owner any reasonably adequate procedure for the determination and collection of the sums due him for his property.

It appears clearly from the final opinion and decree, that the matter decided by the Supreme Court of Louisiana, is not a mere question of the proper interpretation of the Louisiana constitutional amendment, but is whether or not such amendment violates the Federal Constitution. In light of these circumstances, we submit this action is an invasion upon the property holder's rights under Section One of Amendment No. 14 of the Federal Constitution.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The question of appropriation of property is not a novel one and it is encumbent upon the trial judge to establish the time the appropriation was effected, whether by a physical entry or by the institution of a suit in the Court of original jurisdiction. In the case at bar, the trial Judge stated appropriation was a harsh remedy and property should not be taken except in strict compliance with law. In this case, the Supreme Court of Louisiana disagreed with the trial Judge regarding date of appropriation, the

Supreme Court fixing it as October 21st, 1930, the day the Board of Commissioners of the Orleans Levee District merely resolved that the property in that general area was to be appropriated for said work, all in conflict with the provisions of Amendment No. 5 and Amendment No. 14, Section 1, of the Constitution of the United States. To appropriate means to take physical possession first and then pay. The Levee Board did nothing but resolve in 1930, until this suit was filed on November 17th, 1954.

The decree of the Louisiana Supreme Court is in direct violation of Amendment No. 5, and Amendment No. 14, of the United States Constitution in holding that the date the resolution was adopted by the Levee Board is the date of appropriation.

The requirements necessary to complete an appropriation are brought out by Judge Dawkins, of the Federal District Court for the Eastern District of Louisiana, in *Dalche, et al., v. Board of Commissioners of Orleans Levee Board, et al.*, which case is based on Article 16, Section 7, of the Constitution of Louisiana, as amended, the same article and section at issue in the case at bar:

> "The amendment to the Constitution authorizes the Board to acquire the property within the district, either by expropriation or appropriation. Of course, to appropriate it means that the Board may take possession, if it has made provisions for paying the value of the property, and reasonably adequate procedure is afforded for the determination and collection of the sums due to the proprietors. In this case, the Board has proceeded by appropriation, and there being not only no con-

stitutional provision against that course, but the same being specifically authorized by the amendment under consideration, it may proceed in that manner and leave the owner to his remedy under the law."[2]

Also, with respect to the legal interpretation of the term "appropriation", the trial Judge, in giving his appreciation of the facts and law in this case, stated:

> "The right to appropriate, that is, to physically take and then pay the price fixed by court, can only be accomplished by the physical taking, or acts constituting physical taking, or positive notice that it will be taken. The owner will then know definitely what his legal rights are. The appropriation is not effected as long as the owner has dominion and control over his property."[3] See Appendix "A".

In the cases of *United States v. Rogers* and *United States v. Highsmith*, this held that the United States, having appropriated lands for reclamation purposes, had the duty to make just compensation as of the time when the owners were deprived of their property.[4]

The highest courts of the States of Iowa and Massachusetts concur in the opinion that, damages are as-

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[2]49 Federal (2d) 374.

[3](R-70).

[4]U. S. v. Rogers, 255 U. S. 163; U. S. v. Highsmith, 255 U. S. 170.

sessed as of the date of the initial physical interference with the rights for which compensation is given.[5]

In the case at bar, we must now examine the resolutions of the Executive Board, and of the Board itself, which read as follows:

Resolution of Executive Committee passed on August 8, 1930.

> "Resolution states that 'all property . . . not heretofore appropriated and taken possession of shall be appropriated and taken possession of by this Board, and that any owners of private property thereon shall be paid the market value of said property at the time of its appropriation by this Board.
>
> . . .

Resolution of the Board passed on October 21, 1930.

> "A motion by . . . was adopted, and the property in said area was duly appropriated for said work, all as set forth in said minutes of the Executive Committee's meeting of August 8th, 1930."

No mention was ever made as to how the appropriation took place or when it was completed or whether physical possession was ever taken of the property involved in this suit, nor were any proceedings filed in the Courts of Louisiana to establish the date of appropriation and to fix the value as of the date when physical entry was made or attempted, nor was there a tender of price, nor was any remedy afforded the property holder to protect his

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[5]Iowa—Van Husen v. Omaha Bridge & T. R. Co., 118 Iowa 366, 92 N. W. 47;
Mass.—Ipswich Mills v. Esses County Comrs., 108 Mass. 363; Bates v. Boston El. Ry. Co., 187 Mass. 328, N. E. 1017.

rights. In fact, under direct examination by the Court, the Chief Engineer for the Levee Board admitted that no physical possession was taken of this property by the Levee Board. (Transcript, p. 32).

During the course of trial, a stipulation was entered into by counsel that JOHN CHARLES AURIANNE has enjoyed undisturbed, physical possession of the property from the time of his acquisition, in 1918, until the date of trial of the suit; and further, that all taxes due on said properties were paid by Aurianne, as the assessed owner, either in cash or through a Homestead Exemption in his favor; and further, that no formal notice to vacate was ever served on him, and no notice of appropriation was served. Thereby, by its own acknowledgment, the Levee Board has admitted they did nothing to complete the appropriation until suit was filed in November of 1954.

The enactment of legislation authorizing condemnation by the government of property is not a "taking of property" so as to entitle owner to compensation, even though the enactment may cause a change in the value of the property, since legislation may be repealed or appropriations may fail.[6]

The constitutional provision under which the Louisiana Supreme Court based its decision stated in part, "in the event of expropriation or appropriation the compensation to be paid shall be the actual cash value of the property before the contemplated improvement was proposed and begun."[7] Insofar as the property involved in these

[6]23 Tracts of Land, etc., v. U. S., C. A., Ohio, 1949, 177 F. (2d) 967.

[7]Art. 16, Sec. 7E, Constitution of Louisiana.

consolidated suits, no improvement has begun. As to the date the improvement was proposed, nothing is in the record, either in the Court of first instance or in the Supreme Court of Louisiana, to show when that was. The trial Judge stated in his reasons for judgment that no overt act of appropriation took place until this suit was filed or three years prior thereto, when demand for possession was made, but that would be immaterial, because the value was the same the date of filing suit, or within three years preceding that date.

To accomplish a valid appropriation, there must be a taking of physical possession and just compensation must be paid within a reasonable time. In *Simms v. Dillion*, it is brought out that a State Statute authorizing the State to take property for public uses must provide for the payment of compensation due the owners for such taking within a reasonable time.[8]

In the case of *United States v. Miller, et al.*, the opinion of this Court, delivered by Mr. Justice Roberts, allowed the increase in value of the property involved, without taking into consideration any increment of value due to the Government's authorization of, and commitment to the project, even though only two years had elapsed between the time that the project was undertaken and the time condemnation proceedings commenced.[9]

However, there was a lapse of 24 years between the time the Levee Board expressed their desire to appropriate the property involved in this case until the filing of this suit, and under the decision in the case of *United*

[8]193 S. E. 331.
[9]317 U. S. 369.

States v. Miller, et al., cited above, your petitioners are entitled at least to receive compensation based on the increase in normal market value of 1955. Further carrying out this decision, the trial Judge stated the following:

> "The analysis and the breakdown given by Mr. Derbes as to the value of the ground, the value of the improvements, cost of replacing, less cost of depreciation, considering economics and obsolescence, satisfies me that the property, at a fair market value today, for the Elysian Fields property would be $7,000.00; for the Frankfort or Southline property, $4,500.00; and for the Marigny Street property, $2,000.00."

The Elysian Fields and Frankfort or Southline properties are the ones included in these consolidated cases.

In the testimony of the Chief Engineer of the Levee Board, it was brought out that the Board intended to improve the property involved in these suits and after such improvements, to sell the same for private residential sites. He further stated, under cross-examination, that the map he produced in Court was a site plan of Subdivision Zone 4, Lake Front Development, New Orleans, Louisiana, and was Drawing No. 70, dated May 8, 1948, which includes an area that takes in the property involved here.

As his testimony emphasizes that the only reason for wanting the property at this time is to sell it for private use at a substantial profit to the Orleans Levee Board, and not for the general good, we can see no reason for their being given the property.

There are numerous cases that uphold this idea. Among them are:

Wilton v. St. John's County, 123 So. 527;
Peavy-Wilson Lumber Co. v. Brevard County, 31 So. (2d) 483;
Piper v. Ekern, 194 N. W. 159;
Paine v. Savage, 136 A. 664;
Narragansett Electric Lighting Co. v. Sabre, 146 A. 777;
City of Cincinnati v. Vester, 33 F. (2d) 242;
Fountain Park Co. v. Hensler, 155 N. E. 465.

It is respectfully submitted that allowance of certiorari is amply warranted by the grave Federal Constitutional question involved here.

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APPENDIX "A"

The Board of Levee Commissioners of The Orleans Levee District
v.
John Charles Aurianne

No. 42,490
Supreme Court of Louisiana

FOURNET, Chief Justice.

The plaintiff, The Board of Levee Commissioners of the Orleans Levee District, alleging that it had not been able to agree with the defendant, John Charles Aurianne, on the price to be paid him for certain property appropriated by it in 1930 in connection with the development of the lakefront area bordering Lake Pontchartrain, instituted suit to be adjudged the owner of said property, praying that the court fix a price or valuation thereon "in accordance with the provisions of Article 16 of the Constitution;" and from that portion of the district court's judgment fixing the price on the basis of present value, instead of "the actual cash value of the property before the contemplated improvement was proposed or begun, * *" as stipulated in the Constitution,[1] and decreeing that such amount, $4,500.00, be paid as compensation, the plaintiff has appealed.

The property concerned, being Lot No. 10 in Square 5286, bounded by Frankfort Street, Elysian Fields Avenue, Marigny Street and Columbia Street, in Milneburg (New Orleans), is within the area where the plaintiff Board in its development of the lakefront is authorized to acquire property by various means, including appro-

[1]Art. 16, Sec. 7(e), La. Const. of 1921, as amended.

priation.[2] A house standing on the lot has been occupied by the defendant since 1918, when he acquired the property; the land was then on the lake side of a levee which formerly paralleled the shore line, affording protection to the city of New Orleans from the waters of Lake Pontchartrain. When the lakeshore development was undertaken, the said levee was used as a portion of a boundary line first officially adopted by the plaintiff in a Resolution of October 21, 1925, as the inland boundary of the project—the same inland, or south shore, boundary being later incorporated in a constitutional amendment (1928) authorizing the plaintiff Board to acquire private property north of said line for inclusion in the development, and again repeated in a Resolution of the plaintiff's Executive Committee, approved by the plaintiff Board on October 21, 1930, which Resolution provided that "* * * all property in said area between said south boundary line and Lake Pontchartrain on the north side, not heretofore appropriated and taken possession of, shall be appropriated and taken possession of by this Board, and that any owners of private property thereon shall be paid the market value of said property at the time of its appropriation by this Board out of the taxes to be levied in the City of New Orleans in accordance with law; the map which is attached to the report of the Chief Engineer is recommended to be made a part of this ordinance. * * *" The said Resolution was duly recorded in the Conveyance Office of the Parish of Orleans and public notice thereof appeared in the press.

By the constitutional amendment of 1928, the total lakefront area was divided into five zones "for the pur-

[2]Ibid.

pose of construction and administration," each to extend between the boundaries indicated; and following the description of the respective zones was the limitation that "except as to fill and flood and wave protection said zones shall be completed one at a time, so that one zone shall be finished before another is begun * * *."[3] Meanwhile, beginning in 1925, the work of dredging the lake and filling the area between the inland boundary and the breakwater (later replaced by a sea wall) was begun. No fill was pumped onto the property of the defendant, none being necessary. The land lies in the area designated as Zone 4, and in the process of early development a retention levee was built along the shore line, some 600 feet distant from defendant's property, to keep the section free of the water and slush caused by dredging operations. Following completion of work in three of the zones, the development of Zone No. 4 was undertaken. Negotiations as to the value of the property between the plaintiff and defendant, extending over the past several years, having failed, the present suit was instituted on November 17, 1954, resulting in the judgment from which this appeal was prosecuted.

The plaintiff Board contends that the appropriation was effected in 1930, upon recordation of its Resolution of October 21, 1930, and upon notice being given in the public press; and in the alternative, even if we should hold that the appropriation was not effected until filing of suit, still the compensation to be paid cannot, according to the express provisions of Article 16, Section 7(e) of the Constitution, exceed the actual cash value of the property before the lakefront improvement was begun.

[3]La. Const. of 1921, Art. 16, Sec. 7(b), as added by 1928 amendment.

It is the contention of the defendant, on the other hand—and in this he was in effect sustained by the trial judge—that there was no appropriation until the filing of the present suit, and therefore the value of the property at the time of such taking is controlling. Counsel further argues in brief that this property was not needed for levee protection purposes or for any other public use, and is now wanted only so that it may be sold to another individual for his private use.

A study and analysis of Article 16, Section 7 of the Louisiana Constitution of 1921, dealing with the powers and duties of the plaintiff Board—and especially the 1928 amendment of that section when the text was completely rewritten, boundaries of the lakefront project were defined, the Board's jurisdiction was made exclusive, its powers were broadened, and the list of authorized works was appreciably expanded[4]—reveals that the lawmakers intended the development of the lakefront to be one project, to be effected and completed in an orderly way over a period of time; **that there was to be one appropriation and one scheme of payment,** all fixed in the Constitution, so that private property owners would be uniformly compensated for their lands. Besides the zoning of the project as a whole, breakwaters and water basins were added to the list of works to be located and constructed;[5] the dedication of areas as parks, playgrounds and beaches was contemplated in furtherance of an overall design;[6] the work of reclamation, construction and improvements was to be accomplished by letting out contracts therefor from

[4]Act 292 of 1928, adopted as a constitutional amendment to Article 16, Section 7 of the La. Const. of 1921 in November, 1928.
[5]Sec. 7(a) of Art. 16.
[6]Sec. 7(c) of Art. 16.

time to time, "in accordance with the law at the time of the letting of said contracts;"[7] and in order to forestall demand of a higher price for later developed property, as well as to insure uniformity of compensation throughout the area, there was included the express provision that "* * * **the compensation to be paid** [for property expropriated or appropriated] **shall be the actual cash value of the property before the contemplated improvement was proposed and begun;** * * *."[8] (Emphasis supplied).

The plaintiff in its Resolution approved on October 21, 1930, declared that **all** private property in the described area which had not previously been appropriated was then appropriated, and gave public notice of such action in the press; that the work in Zone 4 (other than bulkheading and filling) was not undertaken for many years was due to the constitutional requirement that work in one zone had to be completed—interpreted by this Court to mean fit for occupancy, and salable[9]—before that in another is begun, and cannot profit the defendant in the award of compensation.

There is the testimony of only one witness as to the value of the lot and improvements in 1930; the evidence on that score is too meager, and is not satisfactory, so the case will be remanded for additional proof.

For the reasons assigned, the judgment of the lower court is set aside, and it is now adjudged that the Board of Levee Commisisoners of the Orleans Levee District be

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[7]Sec. 7(g) of Art. 16.

[8]Sec. 7(e) of Art. 16.

[9]Welsh v. Bd. of Levee Comm'rs of New Orleans Levee District, 168 La. 1037, 123 So. 705.

decreed to be the owner of: A certain lot of ground and improvements thereon, in the Third District of the City of New Orleans, at Milneburg, in square bounded by Frankfort Street, Elysian Fields Avenue, Marigny Street and Columbia Street, designated as Lot No. 10, which said Lot No. 10 measures twenty-eight (28′) feet and two (2″) inches front on Frankfort Street by one hundred and fifty (150′) feet in depth French Measure. It is further ordered, adjudged and decreed that the case be remanded to the lower court to receive evidence and fix the valuation of the above described property as of the date of its appropriation by the plaintiff, that is, October 21, 1930, and to render judgment accordingly, all in conformity with Article 16, Section 7 of the Louisiana Constitution of 1921, as amended.

McCALEB, J., Concurring

While I entertain doubt that the passage and registration of the resolution of plaintiff's Executive Committee, which was approved by plaintiff on October 21st, 1930, effected an appropriation of defendant's property since there has never been an actual entry on his land,[1] it makes no material difference in the result of this case as defendant's compensation can be no greater than the value of his property in 1930 or, more accurately, the time when the Board proposed and began the Lakeshore Improvement project. Hence, if, as I believe, the trial judge was correct in regarding this to be an expropriation proceeding, de-

[1]The general rule is that the taking is not complete until the grantee of the power of eminent domain enters the land. 29 C. J. S., Section 135 and cases cited in support of the text; Marion & R. Valley R. Co. v. United States, 270 U. S. 280, 46 S. Ct. 253, 70 L. Ed. 585 and U. S. v. Dickinson & Withrow, 331 U. S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789.

fendant is not entitled to be paid the market value of his land as of the date of the institution of the suit in view of the plain provisions of Section 7(e) of Article 16 of the Constitution that:

> "In the event of *expropriation* or *appropriation* the compensation to be paid shall be the actual cash value of the property *before the contemplated improvement was proposed and begun;* * * *" (Italics mine).

For this reason, I respectfully concur.

The Board of Levee Commissioners of The Orleans Levee District
v.
Henry Aurianne, Et Al.

No. 42,496
Supreme Court of Louisiana

FOURNET, Chief Justice.

The issues presented for our determination in this case are identical with those raised in The Board of Levee Commissioners of the Orleans Levee District v. John Charles Aurianne, No. 42,490, with which it was consolidated for trial, and the decision in that case is, therefore, controlling here.

For the reasons assigned in The Board of Levee Commissioners of the Orleans Levee District v. John Charles Aurianne, No. 42,490, handed down this day, the judgment appealed from is set aside, and it is now adjudged that The Board of Levee Commissioners of the Orleans Levee District be decreed to be the owner of: A certain lot of ground and improvements thereon, in the Third

District in the City of New Orleans, at Milneburg, in square bounded by Frankfort Street, Elysian Fields Avenue, Marigny Street and Columbia Street, designated as one-half of Lot 11 or Lot G, which said Lot G measures thirty-three and nine-tenths (33.9′) feet front on Elysian Fields Avenue by a depth of one hundred twenty-seven and nine-tenths (127.9′) feet. It is further ordered, adjudged and decreed that the case be remanded to the lower court to receive evidence and fix the valuation of the above described property as of the date of its appropriation by the plaintiff, that is, October 21, 1930, and to render judgment accordingly, all in conformity with Article 16, Section 7 of the Louisiana Constitution of 1921, as amended.

OPINION OF THE TRIAL COURT.

Let me first give you my appreciation of the facts and law of the case. Then I'll let you argue. Recently the Supreme Court affirmed me in the Wobbe case. The question there was when the value of the property was to be ascertained. Some question arose whether the property was part of the shore or the lake bottom. I held it was part of the upland and had been owned by Wobbe's predecessor in title, and that under the Const. of 1921 the Levee Board had the right to acquire it by purchase, appropriation or expropriation, and that the Levee Board had *appropriated* and taken possession of the property by pumping sand and filling it to grade; and since the appropriation took place at that time, the value had to be fixed as of that date.

Here we have a case where the property is unquestionably within the area defined by the Const. of 1921, and the Levee Board had the right to appropriate, expropriate or otherwise acquire.

The Levee Board started negotiations to expropriate the property by sending its attorney, Mr. Piazza, to Mr. Aurianne to buy the property for $900.00. Negotiations for a conventional transfer failed. The property was not filled, and no notice of eviction or demand that he surrender the property was given Aurianne until, as contended by defendants, this suit was filed by the Levee Board.

The question then arises, should the value be taken as of 1930, when the Levee Board by resolution declared it wanted it, though no appropriation was made and there was no physical taking, and no demand for eviction, or should the value be taken as of 1955, when the Board filed suit for expropriation. When you appropriate, you take and then pay; when you expropriate, you pay before taking, and only after judicial determination of the right to take and the value. Appropriation is a very harsh remedy, and no man's property should be taken unless it is done strictly according to law. This case is different from the facts developed in the Wobbe case.

As a matter of law and fact the appropriation did not take place until the date when suit was filed or three years prior thereto, but that would be immaterial, because the value was the same three years ago and the date of suit.

Though the Levee Board had the legal right to take or acquire the property by appropriation, expropriation, purchase or gift, it did not exercise either right until, say, sooner than three years ago. Its only effort was say, sooner than three years ago. Its only effort was an attempt to negotiation through its attorney, Mr. Piazza, for

the conventional purchase. An owner cannot lose his property for public purposes until it is taken by strict observance of law. A desire to take property expressed by a condemnor authorized by law to do so, is not sufficient. The right to appropriate, that is, to physically take and then pay the price fixed by court, can only be accompliished by the physical taking, or acts constituting physical taking, or positive notice that it will be taken. The owner will then know definitely what his legal rights are. The appropriation is not effected as long as the owner has dominion and control over his property.

The analysis and the breakdown given by Mr. Derbes as to the value of the ground, the value of the improvements, cost of replacing less cost of depreciation considering economic and obsolescence, satisfied me that the property, at a fair market value today, for the Elysian Fields property would be $7,000.00; for the Frankfort or Southline property, $4500.00; and for the Marigny Street property, $2000.00.

Now, gentlemen, that's the way it impresses me. Now if you want to argue the case to me, I'll be very glad to hear it.

BY THE COURT:

I will hold that the appropriation was not made or attempted until some time during the past three years and that the cash values as of the date of the appropriation were thep rices stated before for each of the properties.

OK, gentlemen, that's the judgment of the Court.

THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 334-359 DIV. "C" Docket No. 5

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT

vs.

JOHN CHARLES AURIANNE.

JUDGMENT.

THIS CAUSE came on for trial this day, and was submitted to the Court,

Present: **JAMES DAVID McNEIL,** General Counsel, and **GEORGE M. PONDER,** Special Counsel, for Plaintiff—THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT,
and

OLIVER S. DELERY, Attorney for Defendant, JOHN CHARLES AURIANNE.

The Court considering the pleadings, the law and the evidence and argument of Counsel, for the reasons orally assigned:

IT IS ORDERED, Adjudged and decreed, that there be judgment herein condemning and adjudging the hereinafter described property unto the Board of Commissioners of the Orleans Levee District upon payment to the defendant the sum of FORTY-FIVE HUNDRED AND NO/100 ($4,500.00) DOLLARS,

A CERTAIN LOT OF GROUND and Improvements thereon, in the Third District of the City of New Orleans, at Milneburg, in square bounded by Frankfort Street, Elysian Fields Avenue, Marigny Street and Columbia Street, designated as Lot No. 10, which said Lot No. 10 measures twenty-eight (28′) feet and two (2″) inches front on Frankfort Street by one hundred and fifty (150′) feet in depth French Measure.

IT IS FURTHER ORDERED, Adjudged and decreed, that the above described property be condemned and adjudged to the Board of Commissioners of the Orleans Levee District in fee simple, upon deposit with the defendant of the above adjudged amount.

Judgment read and rendered in Open Court April 29, 1955.

Judgment read and signed in Open Court May 5, 1955.

/s/ L. H. YARRUT

JUDGE.

THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 334-360 DIV. "C" Docket No. 5

THE BOARD OF LEVEE COMMISSIONERS
OF THE ORLEANS LEVEE DISTRICT

vs.

HENRY AURIANNE, ET AL.

JUDGMENT.

THIS CAUSE came on for trial this day, and was submitted to the Court,

Present: **JAMES DAVID McNEIL,** General Counsel, and **GEORGE M. PONDER,** Special Counsel, for Plaintiff—THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT,

and

OLIVER S. DELERY, Attorney for Defendants, HENRY AURIANNE, ET AL.

The Court considering the pleadings, the law and the evidence and argument of Counsel, for the reasons orally assigned:

IT IS ORDERED, Adjudged and decreed, that there be judgment herein condemning and adjudging the hereinafter described property unto the Board of Commissioners of the Orleans Levee District upon paying to the defendants the sum of SEVEN THOUSAND AND NO/100 ($7,000.00) DOLLARS,

A CERTAIN LOT OF GROUND and Improvements thereon, in the Third District in the City of New Orleans, at Milneburg, in square

bounded by Frankfort Street, Elysian Fields Avenue, Marigny Street and Columbia Streets, designated as one-half of Lot 11 or Lot G. which said Lot G measures thirty-three and nine-tenths (33.9) feet front on Elysian Fields Avenue by a depth of one hundred twenty-seven and nine-tenths (127.9) feet.

IT IS FURTHER ORDERED, Adjudged and decreed, that the above described property be condemned and adjudged to the Board of Commissioners of the Orleans Levee District in fee simple, upon deposit with the defendants of the above adjudged amount.

Judgment read and rendered in Open Court April 29, 1955.

Judgment read and signed in Open Court May 5, 1955.

/s/ L. H. YARRUT
JUDGE.

APPENDIX "B"

EXTRACT OF MINUTES OF A SPECIAL MEETING OF THE EXECUTIVE COMMITTEE MEETING HELD ON FRIDAY, AUGUST 8, 1930

RESOLUTION

WHEREAS, in accordance with the advice of the Chief Engineer and attorneys of this Board, the south boundary line of the Lake Shore Development Projects should be amended and re-enacted as per the written report of Mr. John Klorer, Chief Engineer of this Board, made a part of this ordinance or resolution; and

WHEREAS, this Executive Committee endorses and approves the report of said engineer and the proposed amended ordinance which is to be re-enacted;

THEREFORE, this Executive Committee does now recommend to this Board the location of the south bound-

ary line of the Lake Shore Development Project in Zones 1, 2, 3 and 4, as follows:

Commencing at the intersection of the Orleans-Jefferson Parish Line and extension of the south property line of the Robert E. Lee Boulevard (formerly Adams Avenue), thence continuing in an easterly direction along this extended line and along the southern property line of Robert E. Lee Boulevard to the west bank of Bayou St. John thence across Bayou St. John in a northeasterly direction to the southeast property line of Pressburg and the east bank of Bayou St. John; thence in an easterly direction along the south property line of Pressburg Street to the southeast property line corner of Pressburg Street and Spanish Fort Shell Road, thence in a northerly direction along the east property line of Spanish Fort Shell Road to the southeast property line of Hibernia Avenue, Edinburgh Avenue and the Spanish Fort Shell Road; thence in an easterly direction along the south property line of Hibernia Avenue to the southeast property line corner of Hibernia Avenue and London Avenue; thence along the south property line of Hibernia Avenue to 100 feet east of the intersection of property lines at the southeast corner of London Avenue and Hibernia Avenue; thence in a northerly direction on a line parallel with the east property line of London Avenue and at a distance of 100 feet to the east of said property line of London Avenue to the south property line of New York Street to the southeast corner of St. Roch Avenue and New York Street; thence northerly along the east property line of St. Roch Avenue to the south-

east corner of St. Roch Avenue and Frankfort Street; thence in an easterly direction to the southeast corner at the intersection of the south property line of Columbia Street with the east new property line of Peoples Avenue; thence in an easterly direction along the south property line of Columbia Street to its intersection with the east property line of Hayne Boulevard, being projected across said Hayne Boulevard; thence along the east and/or south property line of Hayne Boulevard to an intersection with the west property line of the Industrial Canal; thence resuming at the east property line of the Industrial Canal at Hayne Boulevard and continuing along the south side of Hayne Boulevard to a point of intersection at which the south side of Hayne Boulevard projected meets the boundary line between Township 11 south, range 12 east, and Township 11 south range 13 east, within the aforesaid limits in the Parish of Orleans.

IT IS FURTHER RECOMMENDED that all property in said area between said south boundary line and Lake Pontchartrain on the north side, not heretofore appropriated and taken possession of shall be appropriated and taken possession of by this Board, and that any owners of private property thereon shall be paid the market value of said property at the time of its appropriation by this Board out of the taxes to be levied in the City of New Orleans in accordance with law; the map which is attached to the report of the Chief Engineer is recommended to be made a part of this ordinance.

IT IS FURTHER RECOMMENDED THAT, when, passed, this ordinance shall be recorded in the Conveyance

Office of the Parish of Orleans and that public notice in the press shall be given to all persons affected thereby.

EXTRACT OF MINUTES OF THE REGULAR MONTHLY MEETING THE BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT HELD ON TUESDAY, OCTOBER 21st, 1930.

"President Shushan stated all members have been furnished with copies of the minutes of all meetings held since the last regular meeting of the Board meetings of June 17th and July 8th, the Executive Committee meetings of July 11th, July 30th, August 8th, August 18th and October 9th, as well as conference meeting of August 13th.

The President called particular attention to the minutes of the meeting of the Executive Committee of this Board held on August 8th, 1930, calling special attention to that part of the minutes relative to the southern boundary of the Lake Pontchartrain Improvement project as set forth in the said minutes. A motion by Commissioner H. W. Whiteman, seconded by Commissioner H. Tom Malone approving the Committee's action was adopted, and the property in said area was duly appropriated for said work, all as set forth in said minutes of the Executive Committee's meeting of August 8th, 1930.

Commissioner J. A. Thomas moved the adoption of the minutes of all of the above mentioned meetings. Commissioner H. W. Waguespack seconded the motion and the same carried unanimously.

APPENDIX "C"

ORIGINAL BRIEF ON BEHALF OF JOHN CHARLES AURIANNE, APPELLEE.

ASSIGNMENT OF ERRORS.

Appellee agrees with the judgment of the District Court, as the Appellant did not show proper appropriation, or physical possession, before filing suit in the District Court.

ARGUMENT.

It is the position of John Charles Aurianne, Appellee, that there was no appropriation of the property before the filing of this suit in the District Court, and that compensation should be paid based on valuation as of the day suit was filed.

This is brought out in the reasons for judgment given by the trial judge, which are quoted, as follows:

"BY THE COURT:

"Let me first give you my appreciation of the facts and law of the case. Then I'll let you argue. Recently the Supreme Court affirmed me in the Wobbe case. The question there was when the value of the property was to be ascertained. Some question arose whether the property was part of the shore or the lake bottom. I held it was part of the upland and had been owned by Wobbe's predecessor in title, and that under the Const.

of 1921 the Levee Board had the right to acquire it by purchase, appropriation or expropriation, and that the Levee Board had **appropriated** and taken possession of the property by pumping sand and filling it to grade; and since the appropriation took place at that time, the value had to be fixed as of that date.

"Here we have a case where the property is unquestionably within the area defined by the Const. of 1921, and the Levee Board had the right to appropriate, expropriate or otherwise acquire.

"The Levee Board started negotiations to expropriate the property by sending its attorney, Mr. Piazza, to Mr. Aurianne to buy the property for $900.00. Negotiations for a conventional transfer failed. The property was not filled, and no notice of eviction or demand that he surrender the property was given Aurianne until, as contended by defendant, this suit was filed by the Levee Board.

"The question then arises, should the value be taken as of 1930, when the Levee Board by Resolution declared it wanted it, though no appropriation was made and there was no physical taking, and no demand for eviction, or should the value be taken as of 1955, when the Board filed suit for expropriation. When you appropriate, you take and then pay; when you expropriate, you pay before taking, and only after judicial determination of the right to take and the value. Appropriation is a very harsh remedy, and no man's property should be taken unless it is done strictly according to law.

This case is different from the facts developed in the Wobbe case.

"As a matter of law and fact the appropriation did not take place until the date when suit was filed or three years prior thereto, but that would be immaterial, because the value was the same three years ago and the date of suit.

"Though the Levee Board had the legal right to take or acquire the property by appropriation, expropriation, purchase or gift, it did not exercise either right until, say, sooner than three years ago. Its only effort was an attempt to negotiate through its attorney, Mr. Piazza, for the conventional purchase. This failed and nothing further was done. An owner cannot lose his property for public purposes until it is taken by strict observance of law. A desire to take property expressed by a condemnor authorized by law to do so, is not sufficient. The right to appropriate, that is, to physically take and then pay the price fixed by court, can only be accomplished by the physical taking, or acts constituting physical taking, or positive notice that it will be taken. The owner will then know definitely what his legal rights are. The appropriation is not effected as long as the owner has dominion and control over his property.

"The analysis and the breakdown given by Mr. Derbes as to the value of the ground, the value of the improvements, cost of replacing less cost of depreciation considering economic and ob-

solescence, satisfied me that the property, at a fair market value today, for the Elysian Fields property would be $7,000.00; for the Frankfort or Southline property, $4,500.00; and for the Marigny Street property, $2,000.00.

"Now, gentlemen, that's the way it impresses me. * * *" (Tr., pp. 68, 69 and 70).

And in his judgment, he states:

"I will hold that the appropriation was not made or attempted until some time during the past three years and that the cash values as of the date of the appropriation were the prices stated before for each of the properties. O. K., gentlemen, that's the judgment of the Court." (Tr., p. 70).

During the course of the trial in the District Court by way of stipulation it was agreed that John C. Aurianne, Appellee, had paid all taxes due on the property since his acquisition in 1918 (Tr., p. 38), a portion of which taxes was used to pay for the lake front development and improvement. This portion was the pro rata due by Mr. Aurianne, and due to the fact that no appropriation was ever effected against his property, he has a right to share in the benefits of the lake front development and improvement and to receive the present day value of his property.

Counsel for Appellant further concurred in a stipulation that Appellee had physical possession of the property

from his acquisition until the date of trial of this case in the lower court, (Tr., p. 38), and, therefore, can make no claim that it took any form of physical possession of the property in question, and, further, Appellee is still in physical possession of said property.

The testimony of Appellee that he received no notice of appropriation and no notice to vacate, (Tr., p. 39), went unrefuted in the trial of the case in the lower court, and Appellant cannot now come into court and state that positive notice had been given Appellee that the land would be taken.

It is the contention of the Appellee that this property was not used or needed for levee protection purposes or for any other public use, but it is now wanted only for the purpose of selling as part of a subdivision to another individual for his private use.

"Q. Is this subdivision laid out by the Levee Board for future use to sell lots to individual home owners?

A. That is right.

Q. In other words, this property in question on these three suits are included in this proposed subdivision to sell to individual home owners. Is that right?

A. That is right; that's right." (Tr., p. 63).

Appellee now prays that Appellant's suit be dismissed at its cost, or, in the alternative, it is respectfully

submitted that the compensation allowed Defendant-Appellee by the lower court is just and proper and that the judgment of the lower court should be affirmed accordingly.

Respectfully submitted,

OLIVER S. DELERY,
Attorney for John Charles Aurianne,
Appellee.

SUPPLEMENTAL AND AMENDED BRIEF ON BEHALF OF JOHN CHARLES AURIANNE, APPELLEE.

This supplemental and amended brief is filed as a reply to Appellant's brief, and to some of the questions propounded by the Court during oral argument of the case.

The two propositions presented are: (1) Whether this Court has already decided that the mere recordation in the Conveyance Office of the resolution by the Levee Board is itself an act of appropriation without the necessity of entry or physical taking of the property; (2) Whether the doctrine that possession of part is possession of the whole, so that the taking of possession of one man's property within the area to be appropriated was the accomplishment of the taking of possession of property belonging to a different, adjacent owner.

There is no doubt that Constitutional Article 16, Section 7, authorizes the Levee Board to acquire "by donation, purchase, exchange, expropriation or appropriation", the property involved here, and to pay for it the market value as of the date of its appropriation, which value is not to reflect the improvements contemplated. This provision of the Constitution sets forth no procedure for the appropriation, expropriation or acquisition, so therefore the procedure must be determined by the general laws governing the acquisition of property by public boards or others authorized to exercise the right of eminent domain.

There is no pretense here that the Levee Board did anymore than record in the Conveyance Office its resolution to acquire the property.

Counsel for the Appellant argued that the case of *The Board of Levee Commissioners v. Wobbe, et al., 78 So. (2d) 6, 226 La. 1016*, decided that the recordation in the Conveyance Office of the resolution was all that was necessary to effect the appropriation. That case, of which the Chief Justice was the author of the opinion, held:

> "A careful reading of the constitutional provisions and the Resolutions adopted by the Board pursuant to the authority therein granted convinces us that the District Court was correct in holding that at the time of the adjudication to the State in 1934 for the unpaid taxes of 1932, the property was not subject to taxation, title having passed to the Levee Board **by virtue of its having appropriated the property - - -.**"

In addition to the text, the footnotes under this citation refer to a resolution of the Board in October, 1930, as including the property herein named; and further, the footnote states:

> "That the plaintiff took physical possession of the extensive area including the property concerned, is conceded; under its contract with the Reynolds Dredging Company, the land was filled in and raised several feet".

Therefore, the issue in the case cited was not the sole resolution accomplishing appropriation, but the reso-

lution plus the physical taking by virtue of its being filled in several feet, in accordance with the authority granted to the Board to take, and to use, and to develop the property.

It is conceded here that the property involved was not within the area filled in. As a matter of fact, it was beyond a levee that was constructed to prevent filling in and flooding, and other than to record the resolution in 1930, there was no physical taking; there was no suit to take; there was no notice that it was being taken; there was no tender of a price; the appellee occupied his land all that time, and paid taxes on it from 1930 up until the time of the suit.

The lower court which decided the *Wobbe* case itself differentiated the two, in that in the cited case physical possession was taken to accomplish the appropriation, whereas, in this case, possession was not demanded until ten or eleven months before the suit was filed.

We find no authority in law authorizing the Levee Board to accomplish the appropriation by mere recordation of a resolution. The only authority we find to the effect that a resolution of a levee board was the only notice required to the owner is the case of *Board of Commissioners of the Red River, Atchafalaya and Bayou Boeuf Levee District v. Trouille, et al., 212 La. 152*, where Section 1 of Act 287 of 1940, authorizes the board to provide a right-of-way to the federal government for flood control, and provides that the *proces verbal* of the property intended to be appropriated be filed in the Conveyance Offices of the parishes involved. In this cited case, the Levee Board has actually gone on the land and was converting it

to levee purposes, when an injunction was sought, which was denied. Therefore, since there is no authority specifically stating that the appropriation is to be accomplished by the recordation of the resolution in the Conveyance Office, such recordation did not accomplish the appropriation, and such notice merely acted to inform future purchasers, who might want to buy property, of the danger that it might be appropriated.

The general rule is, that the adoption by a designated or authorized board of an order, ordinance or resolution for the condemnation or appropriation of property, while a prerequisite to condemnation or appropriation under the power of eminent domain, is not of itself the appropriation unless the constitutional or statutory authority so states. As pointed out, there is no provision in the Constitution or statutes authorizing the appropriation of property by a simple notice, other than the case cited authorizing such procedure by the Red River Levee District, cited *supra*. See *29 C. J. S., 1154, Sec. 223, et seq., Verb:* "Eminent Domain".

In addition to the absence of constitutional or statutory authority in Louisiana for the appropriation of property by the mere resolution of the condemning authority and that such procedure without tendering the amount or depositing it in court would be denial of due process of law under the Federal Constitution, we refer Your Honors to the United States Circuit Court of Appeals for the Sixth Circuit in the matter entitled, *Twenty-three Tracts of Land, &c., v. United States*, reported in the *177 Fed. (2d), at p.967*, where the Court gave this further logical and legal reason why the mere authority to con-

demn and without the physical entry for exercising dominion and control over the property is not an appropriation under the law in the following language:

> "The claim for compensation to which a land owner is entitled for the taking of his property by governmental authority arises at the time of taking. The enactment of legislation which authorizes condemnation of property is not such a taking, even though it may cause a change in the value of the property. Such legislation may be repealed or appropriations may fail. Filing of a petition in condemnation without taking possession is not a taking. The condemnor may discontinue or abandon his effort."

Even though the Levee Board, in 1930, made the first step by adopting and recording a resolution, and did nothing more; did not enter upon the property; did not exercise dominion or control over it; did not change its physical appearance as an exercise of dominion; and did not deposit the money in court, or offer the value to the owner, but permitted the owner to remain in possession as owner and pay taxes for 20 years or more, must be held to have been a discontinuance or an abandonment of the original intent of the Board to exercise its right of appropriation under the law.

Counsel for the Appellant cites in his brief the case of *Dalche v. Board of Commisisoners of the Orleans Levee District, 49 F. (2d) 374.* That case was decided by Judge Dawkins of the United States District Court, and merely held that where the Levee District appropriated the lands under the Lakefront Improvement Project, the owners' remedy for compensation was by action at law,

and that the appropriation was for a public purpose; but the question when the appropriation took place was not at issue. However, we find on Page 385 of the reported decision this language:

> "The amendment to the constitution authorizes the Board to acquire the property within the district either by its expropriation or appropriation. Of course, to appropriate it means that the Board may take possession if it has made provision for paying the value of the property and reasonably adequate procedure is afforded for the determination and collection of the sums due to the proprietors."

In *General Box Company v. United States, 107 F. Supp. 981*, the court held, that generally speaking, private ownership of property is still recognized and protected by the law of the land, and those who seek to take or to deprive the owners thereof for public purposes must follow scrupulously the law which permits it to be done.

In the case of *State, ex rel. City of New Orleans v. Ellis, 113 La. 555*, the court said:

> "The state has imposed upon itself, and upon the political corporations established by it, the same conditions with respect to the exercise of the power of eminent domain as are imposed upon other corporations to which that power is granted. The mere determination of the state, or of a political corporation, to expropriate particular property, does not divest title of the owner, and the courts ought not at that stage to interfere with the owner's

dominion, save to the extent necessary for the ultimate accomplishment of the purpose contemplated by the proposed expropriation."

We can find no reason why this language does not apply to appropriation, which is always a much harsher remedy.

With reference to the procedure authorizing levee boards to expropriate or appropriate, we find the statutory law in Louisiana is *R. S. 38:141, 181,* and *1239; R. S. 19.1* and *19:21.1. R. S. 38:1239,* relating to Orleans Levee Board, provides expropriation proceedings shall be as provided by *Articles 2626 to 2641,* both inclusive, of the *Civil Code.* Therefore, it seems clear that the *Wobbe* case is not authority that a resolution is all that is necessary to accomplish an appropriation because, in that case the resolution was followed by an actual physical taking, which is not present here, and the proceedings were not taken here until two years ago; and there is no statute holding that the mere recordation of notice shall be the appropriation required by law.

Regarding the value, there is no doubt that the law specifically provides that the market value shall be as of the time to taking, and shall not reflect the improvements. We concede that! However, it can hardly be denied that the value of this property since 1930 up until 1950, a period of 20 years, did increase in value from three to fivefold.

Under the circumstances we contend that the judgment should be affirmed, and that for this Court to hold that a mere recording of a notice of appropriation, with-

out an actual notice to the owner or the taking of his property, might be an unconstitutional interpretation since such an interpretation that private property can be so taken would be without due process of law and unconstitutional. Courts never give an unconstitutional interpretation to statutes.

CONCLUSIONS.

In conclusion, we believe the facts and the jurisprudence warrant these holdings:

(1) That the Levee Board in this case did nothing more than express an intention to exercise its right of appropriation when it recorded a general resolution in the Conveyance Office.

(2) That the Levee Board did not take physical possession or exercise dominion and control over the property here by filling it in, as it did in the *Wobbe* case.

(3) That the failure to proceed beyond the mere recordation of the resolution, and in permitting the owner to remain in possession for 20 years and pay taxes, was an abandonment and a discontinuance by the Levee Board of its intention to appropriate the property at that time.

(4) That to hold title was divested here, under the present circumstances, would, in effect, give an unconstitutional interpretation to the proceedings and in the light of the due process law of the Federal Constitution.

(5) That the Levee Board always had a right to renew and continue its authority to appropriate or expropriate, and that it only did so upon the filing of this suit.

(6) That since the value must be fixed as of the taking of physical possession or the institution of proceedings therefor, the value in this case must be fixed as of the date of the filing of the suit.

Respectfully submitted,

OLIVER S. DELERY,
Attorney for Appellee.

BRIEF IN SUPPORT OF PETITION FOR REHEARING IN BEHALF OF JOHN CHARLES AURIANNE AND HENRY AURIANNE, ET AL., DEFENDANTS AND APPELLEES IN THE ABOVE NUMBERED AND ENTITLED CASES.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Louisiana:

I.

The opinion and decree rendered herein on December 12th, 1955 are erroneous, contrary to law and the evidence, and prejudicial to the petitioner's interest in reversing the judgment of the Civil District Court, insofar as it relates to the right of the Board of Levee Commissioners of the Orleans Levee Board to appropriate the property in question and not pay compensation as of the date on which suit was filed.

II.

ERRONEOUS CONSTITUTIONAL CONCLUSION.

(a)

In the opinion handed down by this Court, written by Chief Justice Fournet, he states that Section 7a of Article 16 of the Constitution of 1921, as amended by Act 292 of 1928, states:

> "There was to be one appropriation and one scheme of payment."

There can be found nowhere in the Constitutional provision above cited a basis for one appropriation and one scheme of payment, as Section 7a of Article 16 of the Constitution has nothing to do with the appropriation or scheme of payment of any lands used or taken or con-

templated to be used or taken by the Orleans Levee Board. Section 7a of Article 16 authorized the Orleans Levee Board to construct and maintain levees on Lake Pontchartrain and elsewhere.

(b)

There can be found nowhere in the Constitution of 1921, as amended by Act 292 of 1928, any provision stating that the mere recording of the Resolution of Appropriation by the Orleans Levee Board constitutes or completes a physical taking of the property in the area designated by Article 16, Section 7e of the Constitution of 1921, as amended by Act 292 of 1928. This article and section gives the Board the power to appropriate, but does not set out the mode of appropriation. It further gives the Board the power to expropriate, but does not so state how said expropriation shall be completed. There then can be found no specific mode of appropriation or expropriation, the general law of appropriation that you take physical possession and then pay is the law that should govern in this case.

As is stated in the concurring opinion written by Justice McCaleb, that he entertains doubt that the passage and registration of the resolution of plaintiff's executive committee approved by plaintiff effected an appropriation of defendants' property, since there has never been an actual entry on the land by plaintiff. Since this being the fact, no appropriation has ever been completed on said property and we must now revert to the law of expropriation, which law states that in order to expropriate property you must first file suit and pay compensation for said property before the taking of possession. The time at which the value of the property is to be assessed is the time of filing of the suit in expropriation proceedings.

III.
EFFECT OF DECISION.

The wording:

> "The compensation to be paid for property expropriated or appropriated shall be the actual cash value of the property before the contemplated improvement was proposed and begun." *Section 7e of Article 16 of the Constitution of 1921*, as amended by *Act 292 of 1928.*

Taken in light of the decision handed down by this Honorable Court would mean that the compensation to be paid to any of the property holders whose lands are in the boundaries specified in Article 16, Section 7e of the Constitution of 1921, as amended by Act 292 of 1928, would at any date in the future run the risk of having their property appropriated by the Orleans Parish Levee Board merely by the passing of a resolution and recording said resolution in the Conveyance Office for the Parish of Orleans and the said Orleans Levee Board coming into Court and say although we appropriate your property in 1956, or any future date, we, under the terms of the Constitution of 1921, Article 16, Section 7e, will pay you only the value as of 1930. This is definitely opposed to Amendment No. 5 and Amendment No. 14, Section 1 of the Constitution of the United States of America, where both of these Amendments state:

> "No person shall be deprived of life, liberty or property without due process of law."

The properties lying between Southline Drive and Hibernia Avenue, which are included in the Constitutional provisions of Article 16, Section 7e, will now decrease in value

to the year 1930 and any future or further developer will be running the risk of losing 100% on a dollar for said development.

In Justice McCaleb's concurring opinion, he agrees with the Trial Judge in regarding the proceedings to be an expropriation rather than an appropriation or fixing of value and by so agreeing, in any expropriation proceedings the price to be paid is the market value of the property at the time of institution of said proceedings. Anything to the contrary is a violation of the 5th and 14th Amendments to the United States Constitution.

WHEREFORE, petitioners pray that a rehearing be granted herein, and that on rehearing the judgment of the lower court be affirmed, and for all such other and further relief as equity, law and the nature of the case may require.

Respectfully submitted,

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Attorney for Defendants-Appellees.